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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. 359

MARY ROCCO, AS EXECUTRIX OF THE LAST WILL AND TESTAMENT OF JOSEPH ROCCO, DECEASED, PETITIONER,

against

LEHIGH VALLEY RAILROAD COMPANY.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK AND BRIEF IN SUPPORT THEREOF.

ABRAHAM W. FEINBERG,
CLAYTON R. LUSK,
Counsel for Petitioner.

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MAY IT PLEASE THE COURT:

The petition of Mary Rocco as executrix respectfully shows to this Honorable Court:

A.

Summary Statement of the Matter Involved.

This is an action for the negligent killing of Joseph Rocco, brought under the Federal Employers' Liability Act. Decedent, a track inspector and repair-

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The petition of Mary Rocco as executrix respectfully shows to this Honorable Court:

A.

Summary Statement of the Matter Involved.

This is an action for the negligent killing of Joseph Rocco, brought under the Federal Employers' Liability Act. Decedent, a track inspector and repair-

man, on December 8, 1927, was run down and killed on a blind curve by the defendant's train.

Unusual Physical Conditions.

The single track branch of the railroad extending from Ithaca to Auburn, forty-two miles, runs along the eastern edge of Cayuga Lake, sometimes within ten feet of the water's edge (R. 62). This line was subject to frequent washouts and landslides (R. 95-96) and on such occasions, of course, the work of the track inspectors was most important.

On the 8th of December, 1927, there was a very strong northwest wind blowing over Cayuga Lake, which was driving waves over the tracks and causing washouts (R. 34, 62, 95, 96), which were liable to occur at any time (R. 96). The place of the accident at the southeast corner of the lake, is on a curve; trees and boathouses effectively shut off any view of an approaching train across, or inside the curve (R. 26, 27, 28). The high wind, nevertheless, was driving the water across the tracks at the place of the accident, which caused the rails to be so wet that the brakes did not hold (R. 175).

Decedent's Duties.

Defendant claimed the existence of a rule or instruction, not in the printed rule book, to the effect that the decedent was to inquire of the station operator as to the position of trains before he went out on his tour of duty, and that, on the occasion mentioned, he did not make this inquiry (R. 127). The Division Engi-

neer testified that it was the duty of the decedent to go out, inspect the tracks, and make repairs regardless of where the trains were and that no one could have told, on the day in question, owing to the condition of the track and the trains not keeping any schedule time, where the train actually was (R. 104).

Defendant's Duties.

Plaintiff introduced in evidence a rule of the defendant requiring blasts of the whistle to be given when the train is "approaching curves and other points where employees may be at work on tracks or bridges" (R. 53, 54).

It was further shown that the train entered the curve with no available view as to whether decedent was in the curve, or indeed, whether there was a washout in the curve or not; on rails wet with the waves; at a rate of speed of thirty miles an hour.

The action was tried in the Supreme Court Tompkins County before a Justice and Jury in March, 1929. The jury returned a verdict of $12,096.00 which was reduced by 40 per cent by reason of plaintiff's contributory negligence, judgment being entered for $7,257.60 damages and costs. This judgment was affirmed by the Appellate Division, Third Department, in November, 1930. The opinion of the Appellate Division of the Supreme Court and dissenting opinion appears at pages 257 to 261 of the Record (R. 1, 2) and is reported in 231 Appellate Division 323. Upon appeal to the Court of Appeals of the State of New York, that Court reversed the judgment of the Trial Court

and the affirmance of the Appellate Division and dismissed the complaint. The opinion of the Court of Appeals is reported in 259 N. Y. ——. It appears in the Record pages 271-273. Final judgment of Reversal was entered in the Supreme Court Tompkins County on the 16th day of May, 1932. The proceedings of the Appellate Division of the Supreme Court and Court of Appeals of the State of New York were remitted to the Supreme Court of Tompkins County and this Petition is made for a Writ of Certiorari directed to the Supreme Court of the State of New York. The time within which this Petition for Writ of Certiorari might be filed was extended for thirty days by an order made by Associate Justice Cardozo on August 15, 1932. The time as extended is believed to expire on the 14th of September, 1932.

Reasons Relied on for the Allowance of this Writ of Certiorari.

1. THE UNITED STATES SUPREME COURT OUGHT TO GRANT THE WRIT OF CERTIORARI IN THIS CASE IN ORDER TO DEFINE AND PROPERLY LIMIT THE APPLICATION OF DAVIS V. KENNEDY (266 U. S. 147) and UNADILLA VALLEY RAILROAD V. CALDINE (278 U. S. 139). These cases do not govern where the claimed negligence of the decedent consisted in his failure to acquire knowledge of the general location of a train running three hours behind time and the negligence of the defendant consisted in *failure to give adequate warning to the decedent of the train's entrance into a curve, blind at both ends,* IN ACCORDANCE WITH A RULE *intended for the protec-*

tion of track-workers in this curve under unusual circumstances.

2. THE HONORABLE COURT OUGHT TO GRANT THE WRIT OF CERTIORARI IN THIS CASE IN ORDER TO ENABLE IT TO PROPERLY DEFINE HOW TO DETERMINE AS A MATTER OF LAW, THERE BEING NEGLIGENCE ON BOTH SIDES, WHOSE NEGLIGENCE WAS "PRIMARY" AND WHOSE NEGLIGENCE WAS "SECONDARY", OR WHEN DOES CONTRIBUTORY NEGLIGENCE BECOME THE PRIMARY CAUSE OF AN ACCIDENT?

3. THE UNITED STATES SUPREME COURT OUGHT TO ALLOW THIS WRIT OF CERTIORARI IN ORDER TO ENABLE IT TO PROPERLY DEFINE THE LIMITATIONS OF THE DOCTRINE SET FORTH IN CHESAPEAKE AND OHIO V. NIXON (271 U. S. 218).

4. WE MAINTAIN THE COURT OF APPEALS OF THE STATE OF NEW YORK TO BE IN ERROR IN HAVING REVERSED THE TRIAL TERM AND THE JUDGMENT OF THE APPELLATE DIVISION OF THE SUPREME COURT, THIRD DEPARTMENT, UPON THE THEORY THAT THE DECEDENT'S VIOLATION OF A RULE WAS THE PRIMARY CAUSE OF THE ACCIDENT AND THAT THE DUTY TO WATCH FOR TRAINS RESTED SOLELY ON THE DECEDENT.

It is urged in this Petition and the accompanying Brief that the Court of Appeals of the State of New York has decided the questions above set forth in a way not in accord with the applicable decisions of this Court and the applicable decisions of the Circuit Court of Appeals of the Second Circuit in cases decided within the last two years.

WHEREFORE your Petitioner respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Honorable Court, directed to the Supreme Court of the State of New York commanding that Court to certify and to send to this Court for its review and determination on a day certain to be therein named, a full and complete transcript of the record and proceedings in the case entitled: STATE OF NEW YORK, SUPREME COURT, TOMPKINS COUNTY: Mary Rocco as Executrix, etc., Plaintiff, against Lehigh Valley Railroad Company, Defendant, and that the judgment of the Supreme Court entered upon the Remittitur in the Court of Appeals of the State of New York may be reversed by this Honorable Court, and that your Petitioner may have such other and further relief in the premises as to this Honorable Court seem meet and just; and your Petitioner will ever pray.

MARY ROCCO,
As Executrix of the Last Will and Testament of Joseph Rocco, Deceased.

By ABRAHAM W. FEINBERG,
CLAYTON R. LUSK,
Counsel for Petitioner.

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No. 359

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against

LEHIGH VALLEY RAILROAD COMPANY.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Jurisdiction.

1. This action was brought under the Federal Employers' Liability Act (35 Statutes 65, 66). It was conceded that the tracks of the defendant were used at the time of the accident for interstate business (R. 18). The case was submitted to the jury as an action under the Federal Employers' Liability Act without objection from the defendant (R. 222). The petitioner seeks

a review by certiorari pursuant to Section 237 (*b*) of the Judicial Court on the grounds that the petitioner seeks certain rights, privileges and immunities under the Federal Employers' Liability Act which the petitioner claims were denied by the judgment of reversal of the Court of Appeals of the State of New York.

2. The date of the judgment to be reviewed is May 16, 1932, Record page 269. This judgment is the final judgment of the Supreme Court of the State of New York entered upon the order and remittitur of the Court of Appeals of the State of New York. This final judgment reversed a judgment in favor of the plaintiff and against the defendant in the trial term entered upon a verdict of the jury. It also reversed an affirmance thereof by the Appellate Division, Third Department of the Supreme Court of the State of New York. By an order of Associate Justice Cardozo to whom the matter had been referred by Associate Justice Stone, in charge of the Second Circuit, the time within which the petition for writ of certiorari might be filed herein was extended for a period of thirty days by an order made and dated the 15th day of August, 1932. It is believed that your petitioner's time to file this petition for a writ of certiorari expires on the 14th day of September, 1932.

3. It is submitted that the judgment and order of reversal by the Court of Appeals of the State of New York does not conform to the applicable decisions in the United States Supreme Court and in the Circuit Court of Appeals for the Second Circuit; and that the writ of certiorari ought to be granted in order that

the United States Supreme Court may properly define and limit the application of certain rules set forth in general language in *Chesapeake and Ohio* v. *Nixon* (271 U. S. 218); *Davis* v. *Kennedy* (266 U. S. 147), and *Unadilla Valley Railroad* v. *Caldine* (278 U. S. 139).

4. So far as jurisdiction of the Supreme Court of the United States is concerned all the foregoing cases may be cited to sustain the jurisdiction of the Supreme Court of the United States, to wit: *Chesapeake and Ohio* v. *Nixon* (271 U. S. 218), *Davis* v. *Kennedy* (266 U. S. 147), and *Unadilla Valley Railroad* v. *Caldine* (278 U. S. 139).

II.

Statement of the Case.

On the single track branch of defendant's railroad extending northerly from Ithaca to Auburn decedent was employed as a track inspector. His duties required him to ride a tricycle speeder fitted to the rails and propelled by hand and foot (R. 59, 60). It was misnamed "speeder" because its speed was not much faster than a walk (R. 62). It carried implements for the repair of the tracks (R. 59, 60). The track from Auburn to Ithaca was subject to many washouts and landslides (R. 34, 62, 95, 96). It ran along the eastern edge of Cayuga Lake and on the day of the accident a high west wind caused the waters of the lake to wash over the tracks, resulting in many washouts (R. 34, 62, 95, 96). The train which hit the decedent was south-bound and due to arrive in Ithaca at 12:17 p. m.

It was over three hours late in covering a distance of some forty miles on account of the high wind causing washouts on the day of the accident (R. 104). At 3:30 in the afternoon Rocco left Ithaca on his speeder to cover some seven and one-half miles in accordance with his fixed schedule and was killed about a mile from Ithaca by the delayed train in a blind curve on the edge of the lake where the decedent could not see the approaching train nor the motorman of the approaching train see decedent (R. 24, 27, 28, 29, 58, 67).

The written rule for the government of employees did not require Rocco to inquire as to location of trains but there was evidence of the oral promulgation of an order requiring such an inquiry to be made by track inspectors before leaving Ithaca (R. 127, 128, 129).

The oral order was "lived up to" in a certain respect (R. 128). It was claimed by the defendant's witnesses that decedent went out without inquiring as to the location of trains, although decedent having been killed could not deny this (R. 129). However, it was decedent's duty to go out on his speeder regardless of the location of trains (R. 20, 45); in other words, there was no prohibition against his occupying the tracks with the speeder and performing his duties. The train dispatcher admitted (R. 155) that no one could have told Rocco at 3:14 in the afternoon when the train left Ludlowville where it was even if he had inquired at 3:30, and the witness Pierce admitted that no one could tell where the train would be at any particular time due to the waves washing

over the tracks (R. 104). The train was not running on any schedule or keeping any time (R. 104). The evidence shows that the train was proceeding as the tracks ahead of it were fixed. Among the various duties of the decedent was the duty to fix these tracks if needed.

Rocco had proceeded to the corner of the lake, where the tracks were wet with the waves, where he was hit and killed in the curve before mentioned, where he had no view of the approaching train, nor the engineer of the approaching train of him. As a matter of fact had Rocco called up to find out the location of the trains he would have found that a freight train had left the station at Ludlowville at 2:30 p. m. over forty minutes before the passenger train had left Ludlowville which was at 3:14 p. m. and he would not have found out that the faster electric train had passed the noisier freight on a siding (R. 160, 161). Despite the condition of the tracks, washouts and landslides, the engineer, three hours late, entered this blind curve where Rocco was performing his duties at a speed of thirty miles an hour (R. 172). He could not stop the train after sighting Rocco attempting to take the speeder off the track because the waves were wetting the rails (R. 175). Rocco was either proceeding at about four miles an hour as testified to by Stevens or had stopped as testified to by the engineer (R. 61, 171). The plaintiff introduced in evidence a written rule of the defendant requiring the engineer when approaching curves and other points where employees may be at work on tracks or bridges

or when approaching highway crossings or running against the current of traffic to sound short blasts of the whistle (R. 54). The plaintiff also introduced Rule 105, which reads: "Both the conductor and engineman are responsible for the safety of the train, the observance of the rules; and, under conditions not provided for by the rule must take every precaution for protection" (R. 54). There was some dispute as to the interpretation of these rules but the plaintiff also relied on the common law liability of the railroad for negligence in entering a blind curve where the engineman knew, or ought to have known, that men might be at work without giving signals commensurate with the speed of the train. See *Blanchard* v. *D. L. & W. R. R.* (271 N. Y. 79).

Whether or not the defendant was negligent in not sounding proper warning for Rocco's benefit before entering blindly into the curve on the wet rails at a speed of thirty miles an hour was submitted to the jury. The question of Rocco's contributory negligence, if any, in not ascertaining the location of this train was submitted to the jury. There was also submitted to the jury the question of whether Rocco's failure to gain this additional knowledge was wholly the cause of the accident (R. 236). The jury found for the plaintiff in the sum of $7,257.60.

The Court of Appeals in reviewing this finding, and the intermediate finding of affirmance of the Appellate Division Third Department, holds in effect first on the authority of *Chesapeake and Ohio* v. *Nixon* (271 U. S. 218), that the duty to watch for the trains was on Rocco and by implication, though the Honorable Court does

not say so, that the defendant owed no duty of warning to Rocco, and second, the Court of Appeals holds that Rocco's violation of the unwritten rule about ascertaining the location of trains was the primary cause of the accident. This on the authority of *Davis* v. *Kennedy* (266 U. S. 147), and *Unadilla Valley Railroad* v. *Caldine* (278 U. S. 139).

III.

Specification of Errors.

1. The Court of Appeals erred in holding on the authority of *Davis* v. *Kennedy* (266 U. S. 147), and *Unadilla Valley Railroad* v. *Caldine* (278 U. S. 139), that violation of the rule of inquiry as to the location of trains, by Rocco, was the primary cause of the accident, in the case at bar.

2. The Court of Appeals erred in holding, on the authority of *Chesapeake and Ohio Railroad* v. *Nixon* (271 U. S. 218), that the duty to look out for trains rested solely on Rocco; and in implying, that the motorman under all the physical conditions here present and under the defendant's rules had no duty to look out for Rocco.

3. The Court of Appeals erred in reversing the judgments of the trial court and the Appellate Division of the Supreme Court, Third Department, based on the jury's verdict that defendant was negligent and that plaintiff's negligence was contributory merely.

IV.

ARGUMENT.

A. Violation by decedent of the unwritten rule to inquire as to the location of a train could not be the "primary" cause of this accident, or the "sole proximate" cause, so long as there co-existed, concurrent, independent negligence of the motorman in failing, either (a) to obey a written rule to warn by short blasts any track worker before entering the blind curve, or (b) to exercise ordinary care and prudence in driving a train three hours late over a wet track subject to washouts and, therefore where there might be workmen, at thirty miles an hour, into the blind curve, without warning adequate to his speed, or otherwise having his train under such control as a reasonable trackwalker would have a right to expect considering the abnormal conditions of the track.

1. First it is to be observed, that the rule as to inquiry for trains was proven solely by defendant's witnesses which plaintiff was not in a position to deny. It was in the jury's province to disbelieve even the existence of such a rule.

2. It was admitted that the rule if alive, was of six years' standing and still not printed in the rule book. It was in the province of the jury to find that the rule was not a rigid one.

3. But for the sake of the argument treating the rule as extant, it did not constitute a prohibition of a certain course of action, namely going out on the track.

THE VIOLATION OF SUCH AN ABSOLUTE WRITTEN PROHIBITION WAS AN ESSENTIAL ELEMENT IN DAVIS V. KENNEDY AND UNADILLA VALLEY V. CALDINE, SUPRA.

Indeed in the case at bar it was Rocco's duty to go out on the tracks. Perhaps he might have to repair a washout to permit this very train to reach Ithaca, or the train ahead of it out of Ludlowville, that is the freight train. *Moreover had he called up the station master at* 3:30 *p. m. he would have found that the freight train had left Ludlowville* (*the last telegraph station before Ithaca*) *at* 2:30 *p. m., forty minutes ahead of the passenger train which left Ludlowville at* 3:14 *p. m.* (R. 160); *and, entirely contrary to Judge O'Brien's opinion in the Court of Appeals* (R. 272), *he would have been justified in believing from the elapse of an hour to cover eight miles, that both trains were held up by washouts in his patrol section.* Indeed without calling up the station agent he could before reaching the curve see up the lake and detect the smoke of the steam freight train, had he looked, and he might have relied on this observation as to the location of the freight train which had left Ludlowville first. NO AMOUNT OF CALLING UP THE STATION AGENT WOULD HAVE TOLD HIM THAT THE FAST, SILENT, MOTOR-DRIVEN PASSENGER TRAIN HAD PASSED THE SLOW, NOISY, STEAM-POWERED FREIGHT TRAIN AT AN INTERVENING SIDING AT PORTLAND POINT.

4. The Supreme Court of the United States should lay down the rule that the doctrine of *Davis* v. *Kennedy* and *Unadilla Valley Railroad* v. *Caldine* is inapplicable to cases such as the one at bar, where there is proof of concurrent primary negligence on the part

of the defendant. In neither of those cases was there any concurrent primary negligence on the part of the defendant. If counsel has inaptly stated what we consider are and ought to be the limitations on the rule in those cases, the Honorable Court ought to clarify the proper limitations on the doctrine of those cases, and the development of the law in that respect.

There is the further limitation exemplified by *Unadilla Valley Railroad* v. *Dibble* (31 Fed. 2d Series 239; writ denied 280 U. S. 565), that the negligence of the defendant cannot be predicated upon the act of an employee, who *participates* with the plaintiff in the violation of a rule of prohibition.

B. The doctrine that a track worker, having the duty to inspect and repair, assumes the entire risk of being run down by trains (Chesapeake and Ohio v. Nixon, 271 U. S. 218) is or should be limited by this Honorable Court to ordinary cases of straight tracks and clear views, but has no proper application to workmen hidden by blind curves, or to cases where a written rule, as here, required the giving of warning under unusual circumstances, or where a warning is customarily given, or where presence of workmen is known to the engineman.

1. Such or similar limitations on the general statement contained in *Chesapeake and Ohio* v. *Nixon* have been implied or applied by the Circuit Court of Appeals for the Second Circuit in the following cases:

Norfolk & Western v. *Kratzer* (37 Fed. 2d Series 522).

Reynolds v. *New York, Ontario and Western* (42 Fed. 2d S. 164), 1930.

Dissenting opinion of Judge Chase in *Biernacki* v. *Pa. R. R.* (45 Fed. 2d S. 677), 1930.

Wyatt v. *New York, Ontario and Western* (45 Fed. 2d S. 705), 1930.

In the last case the court said, referring to *Chesapeake and Ohio* v. *Nixon, supra,* "This Court is committed to the doctrine that those decisions are inapplicable, when the railroad violates its own rule requiring the ringing of the engine bell when the engine is about to move."

2. It is submitted that the Court of Appeals erroneously applied the case of *Chesapeake and Ohio* v. *Nixon* to the case at bar, in view of the facts found by the jury that the defendant was negligent in violating its own rule in not adequately warning Rocco, and in view of the unusual circumstances existing in this case, which cast as well a common law duty on the motorman to use due care under all circumstances, in which duty he failed.

It is earnestly submitted that this Honorable Court ought by granting this writ of certiorari to declare in this case the limitation upon the general doctrine of *Chesapeake and Ohio* v. *Nixon,* in accordance with the above cited limitations in the cases in the Second Circuit Court of Appeals.

Conclusion.

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its super-

visory powers and that a writ of certiorari should be granted to your petitioner and this Court should review the judgment of the Supreme Court of the State of New York entered on the order of the Court of Appeals of the State of New York and reverse the same.

Respectfully submitted,

CLAYTON R. LUSK,
Counsel for Petitioner.

(2410)